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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Constitution and the Railway Labor Act permit a labor organization to collect and spend compulsory union dues and agency fees, over the objection of employees, for purposes other than the negotiation and administration of a collective bargaining agreement between that labor organization and the employer of those employees and the adjustment of grievances under that collective bargaining agreement?

2. Where a labor organization collects and spends compulsory union dues and agency fees of employees for purposes other than the negotiation and administration of a collective bargaining agreement and the adjustment of grievances between that labor organization and the employer of those employees, does a scheme which allows for the collection, expenditure, and subsequent union-determined rebate of a portion of dissenting employees' dues or fees used for purposes other than contract negotiation, contract administration and grievance adjustment satisfy the requirements of the Railway Labor Act and the first amendment to the Constitution of the United States?

3. Whether a labor organization, which owes an obligation to dissenting employees not to misspend their compulsory dues and fees for impermissible purposes, must show by clear and convincing evidence from records maintained in accordance with generally accepted accounting principles the amounts spent from those dues and fees for contract negotiation and administration and grievance adjustment?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Howard Ellis, *et al.*, and Allen L. Fails, *et al.*, ("petitioners" or "plaintiffs") respectfully pray that a writ of certiorari issue to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A at 1a-16a), is reported at 685 F.2d 1065 (9th Cir. 1982). The opinion and order of the United States District Court for the Southern District of California granting petitioners' motion for summary judgment as to liability (App. A at 17a-26a) is reported at 78 Lab. Cas. ¶11,290 (S.D. Cal. January 21, 1976). The district court's summary judgment order was later amended (App. A at 27a-28a). The order amending the summary judgment is reported at 79 Lab.Cas. ¶11,765 (S.D. Cal. November 29, 1976).

A trial on the damages issues was held in August, 1978. The additional findings of fact and conclusions of law (App. A at 29a-32a) are reported at 88 Lab.Cas. ¶11,986 (S.D. Cal. March 14, 1980). The final judgment (App. A at 33a-35a) was entered on July 9, 1980, and is neither officially nor unofficially reported.

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[1] Pursuant to Sup.Ct.R. 21.1(k), the appended materials required for a petition for a writ of certiorari have been separately presented. Appendix A ("App. A") is comprised of the court of appeals and the district court decisions. Appendix B ("App. B") contains the verbatim recitation of constitutional and statutory provisions involved in compliance with Sup.Ct.R. 21.1(f). Appendix C ("App. C") lists pending cases in which the line between permissible and impermissible expenditures from compulsory union dues or fees is, or will be, at issue.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on September 3, 1982. On or about November 30, 1982, this Court pursuant to 28 U.S.C. § 2101(b) (1976), granted petitioners an extension of time within which to file a petition for writ of certiorari of thirty-six days, or up to and including January 7, 1983. This petition for certiorari was timely filed on January 7, 1983. Jurisdiction of this court is conferred under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are those of Section 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976), of the Railway Labor Act. The pertinent provisions of the Constitution of the United States are U.S. Const. amend. I and U.S. Const. amend. V. The pertinent portions of the text of these constitutional and statutory provisions are set forth in the Appendix B at 36a.

STATEMENT OF THE CASE

These actions were brought against the Brotherhood of Railway and Airline Clerks and various of its subordinate units (collectively referred to as "BRAC" or "union") in March, 1973 to redress violations of constitutional and statutory rights. Those violations stem from the collection and expenditure of compulsory union dues and agency fees pursuant to a collective bargaining agreement, the enforceability of which is governed by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (1976). The collection and expenditure of the compulsory union dues and agency fees were done over the written objections of certain present and former employees of Western Airlines. The action was commenced in the United States District Court for the Southern District of California. That court had

jurisdiction pursuant to 28 U.S.C. § 1337 (1976) and the Railway Labor Act.

These cases involve two sets of plaintiffs. In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, No. 73-113-N (S.D. Cal. filed March 20, 1973), the plaintiffs are or were employees of Western Airlines but were not members of BRAC. The collective bargaining agreement in effect in 1971 required that these employees tender agency fees to BRAC in an amount equivalent to the dues paid by BRAC members. The *Ellis* plaintiffs submitted written objections to BRAC protesting the collection and expenditure of their agency fees for purposes other than contract negotiation, contract administration, and grievance adjustment with Western Airlines. The *Ellis* plaintiffs sought an accounting from BRAC as to all agency fees paid.

Fails v. Brotherhood of Railway, Airline and Steamship Clerks, 73-118-N (S.D. Cal. filed March 23, 1973) is a class action. The plaintiffs and class members are all members of BRAC who were or are employed by Western Airlines. These employees submitted written objections to BRAC protesting the collection and expenditure of their union dues for purposes other than contract negotiation, contract administration, and grievance adjustment with Western Airlines. The *Fails* plaintiffs and class members also sought an accounting from BRAC as to the use of all amounts of dues paid.

In 1971, the collective bargaining agreement between Western Airlines and BRAC was modified to require all employees in the clerical craft or class to pay compulsory fees and dues to BRAC. From that date until July 30, 1980, BRAC was certified by the National Mediation Board as the exclusive representative for collective bargaining purposes of that craft or class. On July 30, 1980, BRAC was decertified as the collective bargaining representative of the clerical employees of Western Airlines.[2]

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[2] Certification of National Mediation Board, Washington, D.C. in Case No. R-4995, 7 NMB No. 218, July 30, 1980.

During the 1972-1980 period, despite the employees' protests, BRAC collected from all plaintiffs and class members one hundred per cent of the amounts it charged its voluntary members. From June 30, 1972 through 1977[1], BRAC expended compulsory funds on the following activities:

(1) Recreational, social and entertainment activities not attended by management personnel of Western Airlines;

(2) Operation of a death benefit program;

(3) Organizing and recruiting new members for BRAC among the Western Airlines bargaining unit employees;

(4) Organizing and recruiting new members for BRAC and/or seeking collective bargaining authority or recognition for employees not emloyed by Western Airlines, employees not employed in the air transportation industry, and employees not employed in other transportation industries;

(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative materials, and cartoons;

(6) Contributions to charities and individuals;

(7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such programs secured for salaried officers and employees;

(8) Conducting and attending conventions of BRAC;

(9) Conducting and attending conventions of other organizations and/or labor organizations;

(10) Defense or prosecution of litigation not having as a subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC;

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[1] The trial court did not require the union to present evidence as to its expenditures after December 31, 1977. Plaintiffs were foreclosed from further discovery in January, 1977.

(11) Support for or opposition to proposed, pending, or existing legislative measures; and

(12) Support for and opposition to proposed, pending, or existing governmental executive orders, policies, or decisions.

None of the aforementioned activities constituted contract negotiation, contract administration, or grievance settlement or adjustment in BRAC's representation of plaintiffs with Western Airlines. The district court so found in its summary judgment order (App. A at 22a), and held that protesting employees could not be required to contribute to the costs of those activities.[4] BRAC has questioned the court's paragraph 22 ruling only with regard to organizing, convention and publication expenditures, litigation costs, the death benefit program, and Grand Lodge[5] social activities.

On October 6, 1975, BRAC adopted a rebate scheme to be applied to any employee protesting the use of union dues or agency fees for purposes other than collective bargaining. The rebate scheme applies to political and ideological expenditures, legislative and lobbying costs, charitable contributions and fees for affiliation with other labor organizations. The other disbursements enumerated in paragraph 22 have never been included in the rebate program.

The Grand Lodge Board of Trustees annually computes the rebates due to any protesting employee for the prior calendar year. The rebate purportedly is equivalent to the employee's pro rata share of BRAC's disbursements for the activities covered. It has taken BRAC as long as six months after the conclusion of the year during which it has extracted and utilized the dues and fees of protesting employees for admittedly proscribed purposes to tender the rebates. BRAC has been allowed to use

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[4] Hereafter, the categories of expenditures which the district court found not to be chargeable to protesting employees will be referred to as "paragraph 22" expenditures.

[5] The Grand Lodge is the highest level of organization of BRAC, a multi-tiered international union. Beneath it are an intermediate level organization, System Board of Adjustment No. 451, and the various local lodges.

dues and fees to which it has no legitimate entitlement for as long as a year and a half before returning those monies to protesting employees. The district court and the court of appeals found that this rebate scheme satisfies the requirements of the Railway Labor Act as construed by this Court.

In October 1979, after the trial on damages, BRAC appealed to the Ninth Circuit from that portion of the district court's ruling enumerating the types of expenditures which cannot be charged to protesting Western Airlines employees. Petitioners filed a cross-appeal.

The Ninth Circuit reversed the district court decision with regard to the paragraph 22 categories challenged by BRAC. The panel affirmed the district court's ruling that the rebate scheme satisfied the requirements of the Railway Labor Act, rejecting petitioners' claim that sanctioning the collection, expenditure, and subsequent rebate would violate the first amendment. The court affirmed the district court's allocation of the burden of proof.

REASONS FOR REVIEW

I

THE MAJORITY DECISION IS IN CONFLICT WITH APPLICABLE SUPREME COURT PRECEDENT, AS IT FINDS NO VIOLATION OF PETITIONERS' CONSTITUTINAL RIGHTS, EVEN THOUGH PETITIONERS' COMPULSORY DUES WERE COLLECTED AND SPENT IN SUPPORT OF POLITICAL AND IDEOLOGICAL ACTIVITIES OF THE UNION.

In the nearly ten years this litigation has been pending, petitioners have sought unsuccessfully judicial relief for a continued denial of their constitutional rights. Earlier Supreme Court decisions skirted this issue, and limited their rulings to statutory interpretation. ***Railway Employes' Dept. v. Hanson***, 351 U.S. 225 (1956); ***International Ass'n of Machinists v. Street***, 367 U.S. 740 (1961); ***Brotherhood of Ry. Clerks v. Allen***, 373

U.S. 113 (1963). In 1977, the issue was settled by *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). This Court held that union expenditures for political and ideological activities made from dissenters' dues violated the dissenters' first amendment rights. *Id.* at 237. In so ruling, the rights of public and private employees were held to be congruent. *Id.* at 232. The finding of "state action" imposed by Section 2, Eleventh of the Railway Labor Act was expressly reaffirmed. *Id.* at 218 n. 12 (citing *Hanson, supra*).

The majority decision below misinterprets *Hanson* and repudiates *Abood*, by refusing to find any impairment of plaintiffs' constitutional rights. 685 F.2d at 1067-68. A careful analysis of *Hanson* finds no support for the view of the majority: "The [Supreme] court expressly reserved the issue of First Amendment violations as not being presented by the record." *Good v. Associated Students of the Univ. of Wash.*, 86 Wash.2d 94, 102, 542 P.2d 762, 767 (1975). Other courts have confirmed the necessary adjudication of a violation of constitutional rights in comparable cases involving both private and public sector employees. *Beck v. Communications Workers of America*, 468 F.Supp. 93, 97 (D. Md. 1979); *Ball v. City of Detroit*, 84 Mich. App. 383, 269 N.W.2d 607 (1978); *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982); *Robinson v. New Jersey*, 547 F.Supp. 1297 (D. N.J. 1982).

It is essential that the constitutional criteria be applied in these cases, as those criteria form the primary configuration of the limitations upon union expenditures of dissenters' dues. *Abood* is controlling on this point: "The Supreme Court upheld the coercion implicit in the [agency shop] statute with respect to expenditures essential to the collective bargaining process (bargaining, contract administration, and grievance adjustment), but held it to be unconstitutional with regard to other activities in which the union was engaged." *Gavett v. Alexander*, 477 F.Supp. 1035, 1048 (D.D.C. 1979). Similarly, formulation of an adequate remedy is dependent upon the application of constitutional standards to the actions engendering these litigations. The majority's

declination to find constitutional injury in the context of these cases encourages unions in all employment contexts, and in all jurisdictions, to flout the clear rule of *Abood*.

II

PROPER DELINEATION OF UNION ACTIVITIES CHARGEABLE TO DISSENTERS IS AN IMPORTANT AND UNRESOLVED ISSUE OF FEDERAL LAW. TO THE EXTENT THAT STANDARDS HAVE BEEN ARTICULATED IN SUPREME COURT PRECEDENTS, THOSE STANDARDS CONFLICT WITH THE MAJORITY DECISION.

Unresolved questions as to the limitations upon the use of compulsory union dues have plagued this Court and lower courts for decades. Notwithstanding the history of tortuous litigation, there remains no definitive determination of the extent to which dissenting employees may prohibit union use of their compulsory dues. The scope of this agonizing uncertainty is growing ever broader, as more states enact statutes authorizing some form of agency shop provision for public employees.[6]

The swelling tide of litigation involving both private and public sector employees contesting such union expenditures is afflicting federal and state courts with burdensome litigation presenting redundant involvement with complex questions. Issues as to limits upon union spending

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[6] Seventeen jurisdictions have passed such statutes: Alaska Stat. § 23.40.110(b)(2) (1972); Cal. Gov. Code § 3502.5 (West Supp. 1982); D.C. Code Ann. § 1-618.7 (1981); Hawaii Rev. Stat. § 89-4(a) (Supp. 1981); Mass. Gen. Laws. Ann. ch. 150E, § 12 (West 1982); Mich. Comp. Laws Ann. § 423:210 (1978); Minn. Stat. Ann. § 179.65, subd. 2 (West Supp. 1982); Mont. Code Ann. 39-31-401(3) (1981); N.H. Rev. Stat. Ann. § 273A:5 II(c); N.Y. Civ. Serv. Law § 208(3) (McKinney Supp. 1982-83); As construed in *Youngstown Diocesan Confederation of Secondary Teachers v. Shollenberger*, 111 L.R.R.M. 2848 (Ohio Ct. of Appeals March 24, 1981); Ore. Rev. Stat. § 243.650(10), 243.672(1)(c) (1981); R.I. Gen. Laws § 36-11-2 (Supp. 1982); Vt. Stat. Ann. tit. 21, § 1726(8) (1972); Wash. Rev. Code §§ 41.56.122(1), 41.59.100, 41.59.140(1)(c) (1982); Wisc. Stat. Ann. §§ 111.70(1)(h), (2), (3)(a)(6); 111.81(6); 111.84(1)(f) (West 1975 & Supp. 1982).

and the nature of required relief are common among these proliferating lawsuits.[7]

The articulation of clear constitutional principles in *Ellis*[8] will apply beyond the sphere of employment-related disputes. Such principles will govern the increasing number of cases involving protests over the use of compulsory university fees paid by students, and those contesting bar association expenditures from mandatory membership fees. *E.g., Good, supra; Galda v. Bloustein*, 686 F.2d 159 (3rd Cir. 1982); *Arrow v. Dow*, 544 F.Supp. 458 (D. N.M. 1982).

Ellis is the first case presenting the factors needed by this Court to answer the nagging questions raised in *Abood*. It combines a massive evidentiary record with a detailed analysis and adjudication by the trial court.[9] In turn, the court of appeals passed upon the merits of the dispute. It is appropriate for this Court to take the opportunity to review the decision of the Ninth Circuit, as the factual occurrences (employee protests and union spending) giving rise to this litigation are typical of union practices. *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746, 753 n. 6 (1963).

The trial court relied exclusively upon *Street* in holding that any expenditures from petitioners' dues for purposes other than collective bargaining, administration of the collective agreement, and grievance adjustment were prohibited. Appendix A at 24a. This holding is firmly based upon this Court's determination that: "The conclusion to which this [legislative] history clearly points is that Section 2, Eleventh contemplated compulsory unionism to force employees to share the costs of

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[7] A roster of those cases known to petitioners appears at App. C at 37a-40a.

[8] Subsequent references to "*Ellis*" refer collectively to that case and to *Fails*.

[9] Some idea of the bulk of the record can be gained from the fact that the summary judgment motion and its supporting papers (*exclusive* of prior discovery materials which had been filed with the district court) weighed in excess of 16 pounds. The trial record consists of 1,262 pages of transcript and 1,471 exhibits. Many of these exhibits are multi-page financial records.

negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 U.S. at 764 (footnote omitted). However, the majority of the Ninth Circuit panel read *Abood* as exerting minimal curtailment of union spending; *i.e.*, the only prohibitions are those upon compulsory contributions "to political candidates and to express political views unrelated to [the union's] duties as exclusive bargaining representative." 685 F.2d at 1069-70 (quoting *Abood*, 431 U.S. at 234). Following a cursory and selective quotation of language from *Allen*, *Hanson*, and *Abood*,[10] the majority opinion sets forth a test of chargeability based upon a combination of all of the nuances of those cases maximizing the union's power to collect and spend compulsory dues. That test is more expansive in terms than any postulated by BRAC's own counsel during the lengthy history of this litigation. It certainly cannot be squared with earlier decisions of this Court, as it deems expenditures from compulsory dues to be chargeable if they can meet the loose characterization of being "germane to the union's work in the realm of collective bargaining."[11] 685 F.2d at 1072.

In dissent, Judge Whelan emphatically confirmed the correctness of Judge Nielsen's ruling that the costs of each of the union activities listed in paragraph 22 of the summary judgment was non-chargeable. Reliance was placed upon this Court's characterization of institutional [*i.e.*,

[10] A noteworthy omission in the majority's analysis is the distinction between chargeable collective bargaining expenses and those for institutional purposes, which is set forth with clarity in *Schermerhorn*, 373 U.S. at 753 n. 6. As stated in the dissenting opinion of Judge Whelan [C.D. Cal., sitting by designation]: "The majority would seem to have completely ignored the language of the Supreme Court in [*Schermerhorn*] . . . [and] the suggestions implicit in such language -- to wit, that a non-union dissident employee cannot be required to contribute to pay institutional expenses of the union." 685 F.2d at 1076.

[11] Petitioners submit that the majority's test was not based upon the decisions mentioned in it; rather, as Judge Whelan suggests in the dissent, it appears to be an attempt on the part of Judge Pregerson to validate his earlier erroneous trial decisions in *Seay v. McDonnell Douglas Corp.*, No. 67-1394-HP (filed Sept. 22, 1967), *rev'd*, 427 F.2d 996 (9th Cir. 1970), *further proceedings*, 371 F.Supp. 754 (C.D. Cal. 1973), *rev'd on other grounds*, 533 F.2d 1126 (9th Cir. 1976). *See* 685 F.2d at 1076 (Whelan, J., dissenting); *see also* petition for writs of prohibition and mandamus, No. 81-1119 (U.S. filed)

non-chargeable] activities in *Schermerhorn*, and the fundamental thrust of *Abood*. Applying those authorities, Judge Whelan used a two-pronged approach. First, he found that the paragraph 22 activities "are clearly activities to which dissident non-union employees need not contribute." Second, he pruned the vague character of the Court's earlier "germane to collective bargaining" language by determining that any "germane" activities must bear a close relationship to collective bargaining functions involving petitioners' own employer, Western Airlines. 685 F.2d at 1076.[12]

If appellate court judges can purport to draw such divergent standards from the same Supreme Court sources, it can scarcely be expected that rank and file employees can understand and protect their rights in the area of compulsory funding of union activities. The confusion is to the overwhelming advantage of unions seeking to maximize their forced financial support, because those unions have the practical ability to extract payment from dissenters, upon pain of loss of employment. The acknowledged rights of the dissenters have not been respected by unions, despite the employees' most dedicated efforts to obtain judicial protection.

BRAC was a principal defendant in *Street*, and it knew unequivocally in 1961 that compulsory political contributions were forbidden. Yet not until 1975, after *Ellis* had been litigated for two and one-half years and plaintiffs had filed their motion for summary judgment, did BRAC attempt to rectify some of its chronic abuses by adopting a partial dues rebate scheme. Thereafter, BRAC continued to collect from petitioners one hundred per cent of the amounts charged its voluntary members, and to expend those funds on the full range of its institutional programs,

[12] The restrictive reading of *Abood* with regard to the definition of chargeable expenditures has been accepted by two state supreme courts. *Opinion of the Justices*, 401 A.2d 135, 147 (Me. 1977); *Association of Capitol Powerhouse Engineers v. Division of Bldg. and Grounds*, 89 Wash.2d 177, 188, 570 P.2d 1042, 1048 (1977) (*en banc*) (quoting *Abood*). Both courts limit chargeable expenditures to collective bargaining, contract administration, and grievance adjustment.

political activities, and ideological activities. A survey of similar cases pending across the country reveals an identical pattern of union intransigence and widespread impairment of employees' constitutional rights. Millions of employees are affected: those working in the private sector under the Railway Labor Act, those private sector employees governed by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1976) (except in states which have protected their citizens with Right To Work laws); and those public employees in the seventeen jurisdictions permitting agency shop requirements. A public interest of vast importance is at stake; it can only be served by Supreme Court determination of the merits of the case at bar.

Abood summarized the conundrum in cases such as *Ellis* in this fashion: "There will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." 431 U.S. at 236. The Court declined to draw those critical lines in the absence of a detailed factual record and pertinent argument from the parties. *Id.* at 236-37. For the same reasons, this Court in *Street*, 367 U.S. at 768-70, and *Allen*, 373 U.S. at 121, declined to perform this crucial task of line-drawing. With a factual record fully developed and lower court attempts to meet the challenge, a conclusive answer from this Court is long overdue.[13]

The range of union activities evaluated in *Ellis* is comprehensive; a review of the record and the opinions of the trial court and the Ninth Circuit will thus provide this Court with a favorable opportunity to provide guidance for a welter of pending and threatened cases in federal and state courts. It is most desirable that certiorari be granted in *Ellis*, as the critical decisions on the issues it presents have nationwide application.

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[13] Moreover, it is evident that the *Abood* Court saw a private sector case in a Railway Labor Act setting as the easier case in which to undertake the demanding task of line-drawing. The line to be drawn was seen as similar in the public and private sector situations, but the context of constitutional and statutory considerations was noted to be less hazy in a case such as *Ellis*. 431 U.S. at 236.

Far from serving as an instructive guide in the resolution of such disputes, the majority opinion presents a partisan approach predicated upon a mischaracterization of governing Supreme Court decisions. The Ninth Circuit majority opinion utterly fails to explicate its reasoning as to pivotal issues; for example, it nowhere attempts a definition as to what constitutes political or ideological activity. With respect to a number of functions which are clearly not collective bargaining activities, the majority finds them to be chargeable against petitioners because they are "traditional" union activities. If traditional engagement in an activity endows it with a legitimacy justifying its coerced financial support, the majority has, in effect, required protesting employees to sign blank checks payable to their unwanted union representative. No authority is cited for the self-validating effect given long-standing union programs.

The most blatant illustration of the faulty test used by the majority can be seen in its approval of compulsory payment to BRAC's death benefit plan. For years during this litigation, the *Ellis* petitioners were charged for the plan and excluded from participation in it.[14] Death benefits are not negotiated with Western Airlines, and are not mentioned in the collective bargaining agreement governing petitioners' employment.

The chargeability test used by the majority leads to comparable mischief in evaluating other paragraph 22 activities, such as conventions, publications, and organizing. Those union activities are not aimed at the representational responsibilities imposed upon BRAC as plaintiffs' exclusive representative. Those activities are institutional, and therefore non-chargeable under the Court's decision in *Schermerhorn, supra*. Each of those activities is imbued with an overwhelmingly ideological essence, and their costs are impermissible under *Street, Allen,* and *Abood*. The

[14] Query, if tradition is a meaningful criterion of chargeability, is not this exclusion from participation a relevant factor? The same practice -- compulsory payment but no participation -- existed with respect to union publications.

record below is packed with evidence demonstrating the overwhelmingly political focus of union publications and convention activities.[15]

The wide-ranging test of chargeability explicated by the majority runs against the grain of applicable principles of statutory interpretation, in addition to constitutional barriers. It is essential to determine which union activities are performed pursuant to the union's duty to provide services to dissenters. Under the statute, the union represents such persons only with respect to their own employer, and such mandatory services are confined to negotiating and administering the collective agreement, and handling grievances. The duty of fair representation, upon which unions rely as the bedrock of their argument for the extraction of compulsory dues, is no broader than a specific employment relationship. It is the maintenance of the specific employment relationship which is deemed to be the governmental interest justifying compulsory payments from dissenters. The extent of the governmental interest, not the vaulting ambitions of union leaders, governs the extent of the dissenters' financial obligation.

The unduly permissive test of chargeability drafted by the majority is irreconcilable with a proper reading of *Abood*. As one scholarly commentator described this Court's decision:

> It is clear . . . that the [*Abood*] majority did not intend to permit a union to use dissenters' fees for all activities no matter how tenuously related to the bargaining process. Such an approach would not only render meaningless the Court's distinction between collective bargaining and non-collective bargaining activities, but would also

[15] The majority's description of the content of union convention proceedings and publications, and its whimsical description of union social activities, have no basis in the record. These purported factual findings are necessarily contrary to those of the trial court, yet in no instance did BRAC even make an attempt to claim that the trial court findings were clearly erroneous.

conflict with the holding of *International Association of Machinists v. Street* that a private union's contributions to political causes are not related to its duties as bargaining representative.

> Any line separating permissible from impermissible uses of compulsory fees must be so drawn as to ensure that the union can effectively carry out its collective bargaining functions. Since the associational rights of dissenters are restricted by *any* union expenditure, such a line should also ensure that the union expend these funds only for activities that are *essential*, as opposed to merely helpful, to its duties as bargaining representative. A line which distinguishes the expenditures incident to the negotiation and administration of any specific contract from those incident to the negotiation and administration of contracts in general both serves these goals and is consistent with *Street*. Under such a test, expenses necessarily incurred in order to draft, negotiate, secure approval of, administer, or resolve disputes about any one particular contract could be financed by compulsory contributions, while expenditures incurred in order to influence the *framework* within which a particular contract is negotiated could not.

The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 196-97 (1977) (emphasis in original and footnotes omitted). An application of *Abood* consistent with this analysis was made in the Report of the Special Master in *Beck, supra*, a decision written with clarity and depth. *Beck v. Communications Workers of America*, Civ. No. M-76-839 (D. Md. August 18, 1980) (Report of Special Master).

III

THE NINTH CIRCUIT'S ACCEPTANCE OF PREPONDERANCE OF THE EVIDENCE AS THE APPROPRIATE STANDARD OF PROOF CONFLICTS WITH THE CONTROLLING DECISIONS OF THIS COURT.

The district court and the Ninth Circuit accepted the preponderance of the evidence standard as the appropriate allocation of the burden of proof. BRAC was allowed to meet this burden from records which were not maintained in accordance with generally accepted accounting principles. Before the district court, no evidence was presented as to costs incurred by BRAC to negotiate or administer a collective bargaining agreement with Western Airlines concerning the bargaining unit to which plaintiffs belong. No evidence was submitted to show the costs incurred by BRAC in adjusting grievances concerning that same bargaining unit.[16] BRAC was permitted to identify only those of its numerous expenditures which it deemed fell into paragraph 22 catagories.[17]

The Ninth Circuit's acceptance of the preponderance of the evidence standard as the proper allocation of the burden of proof is in direct conflict with the controlling decisions of this Court. In *Allen*, it was held that fundamental fairness, the linchpin of procedural due process under the fifth amendment, requires that the burden of proof be placed squarely upon the shoulders of the union. 373 U.S. at 122. *Speiser v. Randall*, 357 U.S. 513 (1958), adopted as a fifth amendment principle that where "one party has at stake an interest of transcending value . . . [the margin of

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[16] BRAC's auditor confessed that BRAC's accounting records made such a task impossible. BRAC acknowledged that unions generally do not maintain their records in accordance with generally accepted accounting principles.

[17] The result was that every dollar spent by BRAC was presumptively considered to be a Western Airlines collective bargaining expenditure unless it was excluded. This approach has been condemned judicially when utilized by an agency of the federal government, *National Cable Television Ass'n, Inc. v. Federal Communication Comm'n*, 554 F.2d 1094, 1105 (D.C. Cir. 1976), as well as in the area of union spending litigation, *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385 Mass. at 76-77 n. 3, 431 N.E.2d at 185 n. 3; *Ball v. City of Detroit*, 84 Mich.App. at 395-96, 269 N.W.2d at 612-13.

error inherent in all factfinding] is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." *Id.* at 525-26. Freedom of speech is an interest of transcending value, *id.* at 526, and is thus deserving of the more demanding standard of proof before any infringement can be condoned.[18]

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality opinion), the Court applied the clear and convincing proof standard to a libel action by a private individual against a licensed radio station for a defamatory falsehood relating to that private individual's involvement in an event of public or general concern. The more exacting standard was imposed in order to give "the First Amendment sufficient elbow room within which to function." *Id.* at 52. The clear and convincing standard was employed by the special master in *Beck v. Communications Workers of America*, Civil No. M-76-839, *slip op.* at 7 (D. Md. August 18, 1980) (Report of Special Master), a case directly on point with this case.

The Ninth Circuit found that "*Rosenbloom* has been overruled on that very point [*i.e.*, the appropriate standard of proof]." 685 F.2d at 1070 (**citing** *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). The Ninth Circuit's reading of *Gertz* is erroneous. The Court in *Gertz* endorsed the clear and convincing proof standard in cases where first amendment freedoms of speech and press might be chilled by operation of state defamation statutes. 418 U.S. at 342. The Court disagreed only with the *Rosenbloom* plurality's application of the more exacting standard to cases where, because the allegedly defamatory statement was

[18] The imposition of the more demanding standard of proof is simply a corollary to the principle that the party seeking to impinge upon first amendment rights must prove that the impingement is necessary to the effectuation of a compelling governmental interest, and that the means adopted do not lend themselves to a less restrictive alternative. In addition, BRAC admitted in the district court that it owed petitioners a fiduciary duty not to misspend their dues and fees. A fiduciary called upon to acount for property entrusted to it must establish its handling of that property by clear and convincing evidence. *Hobson v. Eaton*, 399 F.2d 781, 784 (6th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

directed to a private individual, first amendment standard were not applicable. 418 U.S. at 343-48.

The duty not to misspend funds and to justify any chargeable expenditure by clear and convincing evidence bears with it the correlative obligation to maintain records so that it can be ascertained whether or not the union has complied with its constitutional obligation. As another court has stated:

> To account is to do just that. The one obliged to account does not fulfill his duty by supplying only that which the beneficiary requests, that which is conveniently accessable, or remaining silent in the face of the beneficiary's inevitable difficulty in trying to construct or reconstruct accounts which ought to have been kept and available.

Bynum v. Baggett Transportation Co., 228 F.2d 566, 573-74 (5th Cir. 1956). For that reason, the articulation of the appropriate accounting standard is important to courts, unions, employees, and employers, whether public or private. The use of a generally accepted, systematic method will reduce the margin of error in any accounting; it will eliminate much bitter litigation, and greatly reduce the burden of judicial involvement in, and supervision of, such disputes.

IV

THE NINTH CIRCUIT'S SANCTION OF BRAC'S REBATE SCHEME DIRECTLY CONFLICTS WITH THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS AND THE DECISIONS OF SEVERAL FEDERAL DISTRICT COURTS, AND IT FAILS TO PROTECT FUNDAMENTAL FIRST AMENDMENT RIGHTS OF PROTESTING EMPLOYEES.

Numerous reasons compel the granting of this petition for a writ of certiorari with regard to the statutory and constitutional infirmity of BRAC's rebate scheme. First, the Ninth Circuit's decision directly

conflicts with the decision of the Supreme Judicial Court of Massachusetts in *School Comm. of Greenfield v. Greenfield Education Ass'n, supra*. Sup.Ct.R. 17.1(a). Second, in deciding that BRAC's rebate scheme was proper under the Railway Labor Act, the Ninth Circuit decided an important federal question which has not been but should be decided by this Court. The Ninth Circuit's decision brings into serious question the constitutionality of Section 2, Eleventh of the Railway Labor Act in that it sanctions an invasion of petitioners' first amendment rights of freedom of speech and freedom of association. Sup.Ct.R. 17.1(c).

A. This Court Has Never Sanctioned The Use Of A Rebate Scheme To Safeguard Protesting Employees' First Amendment Freedoms.

The Ninth Circuit's decision stamps with approval the rebate scheme adopted by BRAC in 1975. This scheme allows for the collection and expenditure of compulsory dues and fees for purposes and activities which BRAC recognizes as being beyond those which can be lawfully charged to protesting employees of Western Airlines. The Ninth Circuit purportedly found support for its validation of the rebate program in this Court's decisions in *Street, Allen,* and *Abood*. This Court has never endorsed the use of a rebate system as prospective protection against the improper use of fees and dues.

The Court in *Allen* endorsed the use of a refund remedy only for fees paid to the union in the past. The Court went on to suggest the use of a *dues reduction* plan for future fee exactions. 373 U.S. at 122.[19]

[19] A number of courts have concurred in this reading of the Court's endorsement of the use of rebates as being limited to retrospective relief. *Galda v. Bloustein, supra*; *Beck v. Communications Workers of America*, 468 F.Supp. at 97; *Ball v. City of Detroit*, 84 Mich.App. at 391, 396, 269 N.W.2d at 611, 613.

In *Abood*, the Michigan Court of Appeals found that the dissenting employees were entitled to no relief because the defendants had failed to indicate to the union the specific expenditures to which they objected. Subsequent to the commencement of the litigation, the union adopted an internal procedure for rebating a proportional amount of plaintiff's dues relating to union expenditures for political and ideological purposes and activities. 431 U.S. at 240 n. 41. This rebate plan was procedurally similar to BRAC's.

Because this Court found that the Michigan Court of Appeals had erred in denying the dissenters any relief, the case was remanded. This Court expressly declined to pass upon the constitutional sufficiency of the internal rebate procedure. *Id.* at 242 n. 45. The Court's concern about the constitutional sufficiency of the rebate scheme is highlighted by Justice Stevens' concurring opinion. *Id.* at 244. *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 815 (1978) (White, Brennan, and Marshall, JJ., dissenting) ("It should be obvious that the alternative means upon the adequacy of which the majority is willing to predicate a constitutional adjudication is no more able to satisfy the State's interest [in preventing the use of corporate resources in furtherance of views with which some shareholders may disagree] than a ruling in *Street* and *Abood* leaving aggrieved employees to the remedies provided by union democracy would have satisfied the demands of the First Amendment.")

Although the Court in *Abood* was concerned with the application of the first amendment to the use of compulsory agency fees under a state statute governing public employment, this Court has recognized that its interpretation of the Railway Labor Act is inextricably intertwined with considerations of freedom of speech and freedom of association. The Court has found that any "difference between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232.

B. Direct Conflict Exists Between The Ninth Circuit's Decision And Decisions Of The Supreme Court Judicial Court Of Massachusetts And Of Other State And Federal Courts.

The Ninth Circuit's endorsement of BRAC's rebate scheme directly conflicts with the Supreme Judicial Court of Massachusetts' decision in *School Comm. of Greenfield v. Greenfield Education Ass'n, supra.* In that case, the School Committee of Greenfield sought a declaratory judgment as to whether it could dismiss teachers for failing to pay an agency fee without violating the teachers' constitutional and statutory rights. The Massachusetts law in question authorized the negotiation of provisions in collective bargaining agreements requiring the payment of an agency fee by non-member public employees as a condition of employment. No agency fee requirement could be imposed, however, "unless [the employee organization] has established a procedure by which any employee so demanding may obtain a rebate. . . ." 385 Mass. at 72 n. 1, 431 N.E.2d at 182 n. 1.

It was conceded by all parties that no employee could be forced over his objection to support social, political, or speech activities of the union. Like BRAC's procedure, a portion of the agency fee assessed non-member employees was used for these impermissible purposes, but was subject to being returned under the union's rebate scheme. *Id.* at 78-79, 431 N.E.2d at 185-86. The protesting teachers maintained that the rebate procedure infringed upon their first amendment rights.

The Supreme Judicial Court of Massachusetts construed the Massacusetts statute as requiring only that protesting employees pay agency fees into an escrow account. Amounts so deposited would not be released to the union until it was determined which portion of the fee was to be used for permissible purposes. The court found that if the statute required exhaustion of the rebate procedure it would be "constitutionally suspect" under the first amendment. *Id.* at 79, 431 N.E.2d at 186. Payment of the entire agency fee to the union pending a rebate doubly damaged the protesting employees. Not only were the employees required to finance objectionable activities of the union, but they were

foreclosed from supporting expressive activities of their own. *Id.* at 83-84, 431 N.E.2d at 189.[20]

The decision of the Ninth Circuit is also in direct conflict with the decisions of lower federal and state courts. This Court has in the past considered conflicts between a federal court of appeals and lower courts in assessing the propriety of granting a petition for a writ of certiorari. *See Curtis v. Loether*, 415 U.S. 189, 191 n. 2 (1974) (conflict between the United States Court of Appeals for the Seventh Circuit and evenly divided reported decisions of the district courts with regard to the right to a trial by jury for actions under Title VIII of the Civil Rights Act of 1964).

In *Robinson v. New Jersey*, 547 F.Supp. 1297 (D. N.J. 1982), the district court granted a preliminary injunction against the enforcement of a state statute which mandated the use of a rebate scheme. Under New Jersey law, a public employee who chose not to become a union member could be charged an agency fee in an amount not to exceed eighty-five per cent of union dues. The right to charge an agency fee was statutorily authorized upon the implementation of a rebate program. *Id.* at 1300-01. The union was statutorily entitled to collect agency fees and use them for political, ideological, and lobbying activities pending return of a pro rata share of the fees paid which were used for those purposes.

In granting the preliminary injunction application, the court declared that the New Jersey statute was unconstitutional. *Id.* at 1321. The court found that the union had no legitimate interest in receiving dues for purposes other than contract negotiation, contract administration and grievance adjustment. The court was convinced that the only way the employees' constitutional rights could be protected was by requiring the union to establish in advance of payment the amount of fees needed to

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[20] This same "doubly damaged" principle was recognized by the Ninth Circuit in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970), *further proceedings*, 371 F.Supp. 754 (C.D. Cal. 1973), *rev'd*, 523 F.2d 1126 (9th Cir. 1976). This principle was ignored by the Ninth Circuit's decision in *Ellis* when it upheld the use of BRAC's rebate scheme.

reimburse the union for performing collective bargaining functions. *Id.* at 1322. In reaching its decision, the court rejected the Ninth Circuit's reading of *Abood* in *Ellis*: "In light of footnote 45 in *Abood's* majority opinion and in light of Justice Stevens' comments in his concurring opinion, it appears to me that the major premise for the Ninth Circuit's conclusion is flawed." *Id.* at 1318. The proper rule of law, which invalidates a rebate scheme of the sort adopted by BRAC, is premised upon the constitutional protections which may not be stripped from dissenting employees. The court held that the *Greenfield* decision was "a reasoned and correct application of *Abood*," and ruled that the "demand and return system" for refunding amounts to objecting employees was constitutionally insufficient. *Id.* at 1321.

Similarly, in *Beck v. Communications Workers of America, supra*, the union had adopted an internal rebate scheme. Nonetheless, the court, recognizing that allowing collection of agency fees for purposes other than collective bargaining, contract administration and grievance adjustment would seriously implicate first amendment rights of agency fee payors, ordered restitution of the amounts improperly collected by the union in the past, and enjoined future collection of agency fees in excess of the amount necessary for collective bargaining purposes. 468 F.Supp. at 97.

In *Ball v. City of Detroit, supra*, the American Federation of State, County and Municipal employees implemented a rebate procedure similar to that adopted by the teachers' union in *Abood*. 84 Mich.App. at 393, 269 N.W.2d at 612. The plaintiffs in the *Ball* case were nonmember employees who were required to pay an agency fee under Michigan state law. The court held that all agency fees already paid in excess of the amount utilized by the union for collective bargaining, contract administration, and grievance adjustment purposes had to be refunded. All future agency fees were ordered reduced by the percentage unrelated to the collective bargaining, contract administration and grievance adjustment functions, with at least annual adjustments in the fee reduction amount. The court required that the agency fees were to be

paid into an escrow account pending a judicial determination of the amount to which the union was entitled. The court felt that the dues reduction and escrow procedures were necessary in order to protect against the use of agency fees, even temporarily, for purposes which were proscribed by the first amendment. 84 Mich.App. at 396-97, 269 N.W. at 613. Political and ideological viewpoints once promulgated, and political influence once applied, cannot be withdrawn from the marketplace of ideas, the legislative chamber, or the polling booth.

The sharp divergence in the interpretations of limiting principles of constitutional law seen in the foregoing cases argues eloquently for a definitive disposition by this Court.

C. The Dubious Validity Of Rebate Programs Presents A Vital Question Concerning The Administration Of Union Security Agreements In Both Private- And Public-Sector Collective Bargaining Which Must Be Decided By The Court.

This Court requires that state and federal statutes affecting first amendment freedoms be drafted and enforced with precision to avoid all but the most compelling, narrow infringements on those fundamental rights. *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) (plurality opinion). "The loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Id.* at 373 (emphasis added). This Court recognized in *Abood* that compelled financial support of labor unions impacts upon protesting employees' first amendment freedoms. 431 U.S. at 222, 234-35. Those employees' interest in preventing even temporary infringements on their first amendment rights must be given far greater consideration than the union's interest in collecting contributions to their representational efforts. The employees' interests are at the core of constitutionally protected individual liberty. The union's interest is derived merely from a statute. *Allen*, 373 U.S. at 118, 122; *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385

Mass. at 84, 431 N.E.2d at 189; *Robinson v. New Jersey*, 547 F.Supp. at 1320.

Over twenty years ago, this Court suggested possible remedies to protect the paramount interests of employees who protest the use of their compulsory dues and fees for purposes other than contract negotiation, contract administration, and grievance adjustment. *Street*, 367 U.S. at 774-75. In *Allen*, this Court further suggested that the unions implement internal remedies to avoid "prolonged and expensive litigation . . . [which] . . . often proves unsatisfactory." 373 U.S. at 123-24. The Court also sought to avoid embroiling the judiciary in monitoring union expenditures continuously in administering relief to employees injured by union spending practices. *Id.* at 122, 124.

Today, there is still not a clear answer as to the types of prospective relief which are compatible with the first amendment. It is petitioners' position that the only prospective relief which is consistent with first amendment principles is that which requires BRAC to escrow the fees and dues charged to dissenting employees. Before any of the escrowed amounts may be released to BRAC, it must be demonstrated from records maintained in compliance with generally accepted accounting principles that the amounts sought reflect the employee's pro rata share of collective bargaining, contract administration, and grievance adjustment expenditures. The amounts sought to be released from escrow by BRAC must be subject to independent audit and court review if necessary, with BRAC at all times bearing the burden of demonstrating by clear and convincing evidence that the amounts charged are limited to the constitutionally permissible purposes.

A number of states which allow collective bargaining between public employers and public employee unions provide for the refund or escrowing of agency fee payments as a condition to allowing the execution of union security agreements compelling contributions from non-members. Hawaii Rev. Stat. § 89-4 (Supp. 1981); Mass. Gen. Laws Ann. ch. 150E, § 12 (West Supp. 1982); Minn. Stat. Ann. § 179.65(2) (West Supp. 1982)

(escrow)[21]; N.J. Stat. Ann. § 34:13A-515(c) (West Supp. 1982-83); N.Y. Civ. Serv. Law § 208(3) (McKinney Supp. 1982-83). Until this Court states emphatically that rebate programs do not protect fundamental first amendment rights of dissenters, employees who labor under union security provisions continuously interfering with their fundamental freedoms will suffer irreparable injury. Moreover, the continued uncertainty as to which types of statutory or internal union procedures satisfy constitutional requirements inhibits the adoption of meaningful administrative remedies which could reduce costly litigation and avoid time consuming judicial supervision of court-imposed remedies.

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[21] Section 179.65(2) was amended in 1976 to expressly provide for fee escrowing and a determination of the validity of any fee assessment prior to release to the public employee labor organization. Act of March 31, 1976, ch. 102, § 2, 1976 Minn. Laws 249. This particular procedure was suggested by the Supreme Court of Minnesota in *Robbinsdale Education Ass'n v. Robbinsdale Fed'n of Teachers, Local 872*, 307 Minn. 96, 109, 239 N.W.2d 437, 445, *vacated and remanded sub nom. Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872*, 429 U.S. 880 (1976). The court there found no compelling governmental interest justifying the use of union fees prior to a determination of their validity, implicitly recognizing the unwarranted infringement upon the employees' first amendment rights from allowing the interim use of those monies for impermissible purposes. *Id.* at 107-08, 239 N.W.2d at 444. The court's 1976 opinion has been reinstated. *Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872*, 316 N.W.2d 551, 552, *cert. dismissed*, ___ U.S. ___ (October 4, 1982) (No. 81-2403).

CONCLUSION

Since the *Hanson* decision in 1956, this Court has been unable to resolve definitively the troublesome issues involved in the collection and use of compulsory dues. *Ellis* at last provides a suitable record for solution of these important and difficult constitutional and statutory problems. Therefore, the Court is respectfully requested to grant certiorari in this case.

Respectfully submitted,

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